Lee No 59

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 503

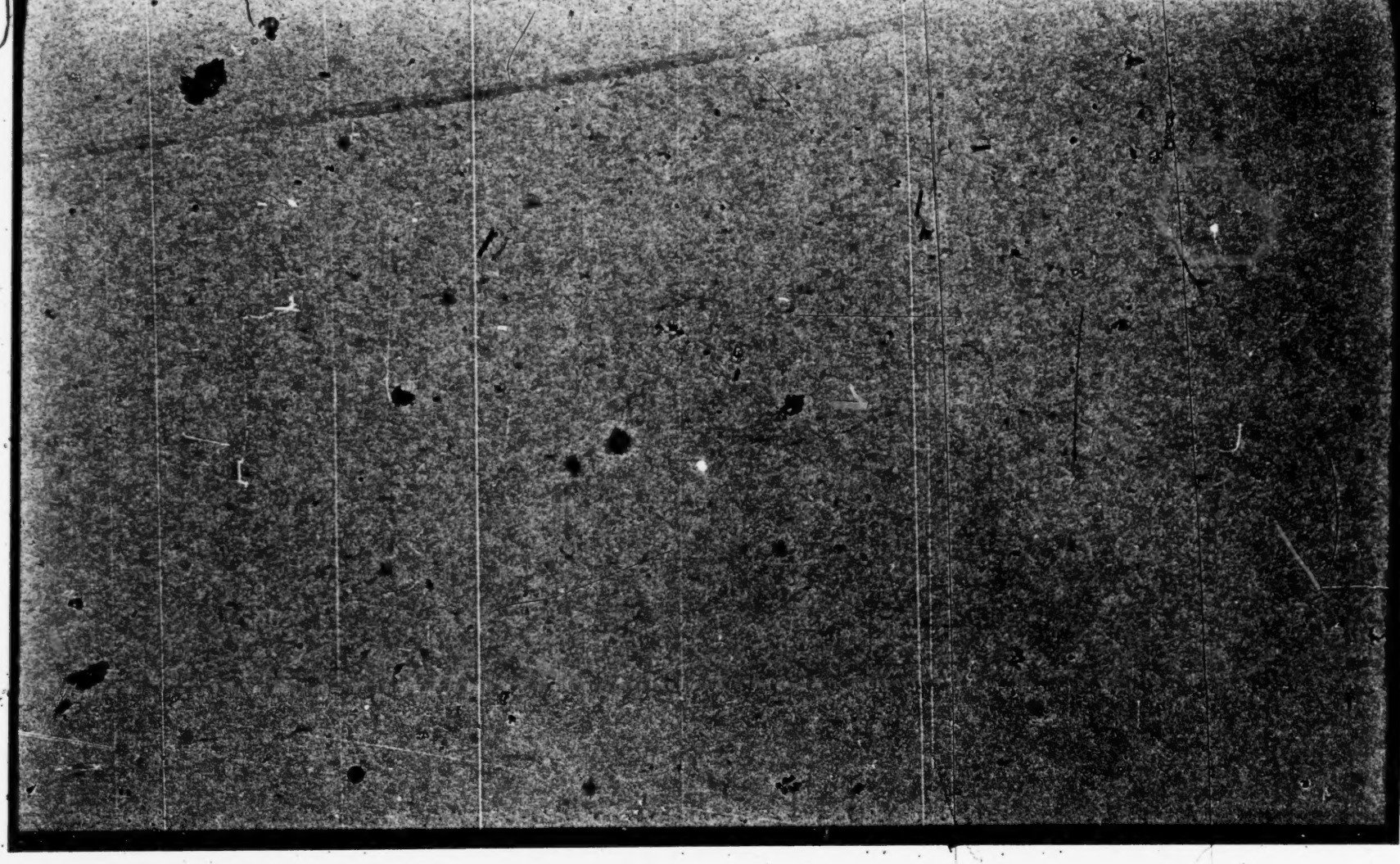
LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT

vs.

ALBERT BAILEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

ALBERT BAREFIELD

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

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IN CIRCUIT COURT OF POPE COUNTY, ARKANSAS

ALBERT BAREFIELD, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, INC., Defendant

COMPLAINT AT LAW—Filed Sept. 21, 1932

Comes the plaintiff, Albert Berefield, and for his cause of action herein against the defendant, the Life & Casualty Insurance Company of Tennessee, Inc., alleges and states:

That the plaintiff, Albert Barefield, is a resident of Russellville, Arkansas, and the defendant, the Life & Casualty Insurance Company of Tennessee, Inc., is a foreign insurance company, with its head office in Nashville, Tennessee, and has applied for and been permitted to do business in the State of Arkansas.

That on the 14th day of March, 1928, the defendant herein, the Life & Casualty Insurance Company of Tennessee, Inc., issued Policy No. 221659, covering the life, hands, feet and eyes of the plaintiff, Albert Barefield, for an annual premium of Five Dollars ($5.00), which premium was paid in advance.

That the said premium was paid on or before the 15th day of March in each and every year, including 1932.

That by the terms of said policy, in case the insured should lose the sight of one eye by accident to any private horse-drawn vehicle or private motor-driven car, in which insured is riding or driving, that the company herein referred to as defendant shall pay to the insured the sum of One Thousand Two Hundred Fifty ($1,250.00), and that each consecutive renewal without a default in payment of premium will increase the amount of benefits herein provided for death, dismemberment, or loss of sight of the [fols. 3-5] insured at the rate of ten per cent of the original amounts, until fifty per cent of the original amounts are thus added.

That on the 25th day of February, 1932, the plaintiff herein was traveling north on the Dardanelle-Russellville Highway in a Ford Coupe in company with Emmett Barefield, son of the plaintiff herein, when the said plaintiff met a large Sedan traveling in the opposite direction at a high rate of speed, when just as they were even with the Sedan, the said Sedan ran over a stick, flipped the said stick in the direction of the car in which this plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye.

That the accident above referred to is covered by the terms of said policy; that said accident occurred while said policy was in full force and effect.

That the said company has refused and neglicted to pay said sum in spite of repeated demands by this plaintiff.

Wherefore, premises seen, plaintiff prays judgment in the amount of One Thousand Six Hundred Twenty-five Dollars ($1,625.00), plus twelve per cent damages upon the amount of said loss, interest at rate of 6% from date of accident, attorney's fees, costs herein, and all other and further relief which is deemed just and proper.

—— ——, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 6] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

ANSWER—Filed Nov. 15, 1932

Comes now the above named defendant, and for its answer to the complaint of the plaintiff filed herein, alleges and states:

That it denies that by the terms of the policy referred to in plaintiff's complaint, in case the plaintiff should lose the sight of one eye by any accident to any private horse drawn or private motor driven vehicle or car, in which the assured is riding or driving, that the defendant should pay to the plaintiff the sum of $1250.00, or any other amount,

and denies that each consecutive renewal without default in payment of premium increases the amount of alleged benefits provided for the loss of the sight of the plaintiff's eye, and denies that said alleged increase is at the rate of 10% of the original amount until 50%, or any other per cent, of the original amount has been added.

That it denies that on the 25th day of February, 1932, or at any other time, the plaintiff herein was traveling North or in any other direction, on the highway mentioned in plaintiff's complaint, or on any other highway, and denies that plaintiff was proceeding as alleged in his complaint, in a Ford Coupe, and denies that plaintiff met a sedan traveling in the opposite direction or in any direction, and denies that said sedan was traveling at a high rate of speed, and denies that when said alleged sedan got even with the car in which plaintiff is alleged to have been driving, that said sedan ran over a stick, and denies that said stick was flipped in the direction of the car in which the [fol. 7] plaintiff was riding, and denies that said stick struck the car in which plaintiff is alleged to have been riding, and denies that said stick struck said car at the front or left hand door, or in any other place. That it denies that said stick was hurled into the car in which plaintiff was riding, and denies that it struck the plaintiff in the right, or either eye, and denies that the plaintiff was thereby caused to lose the tital sight of said eye, and denies that the plaintiff was thereby caused to lose the irrecoverable sight of said eye:

That it denies that the alleged accident referred to in plaintiff's complaint is covered by the terms of the policy referred to in said complaint.

Wherefore defendant, having fully answered, prays that the plaintiff take nothing by reason of his complaint herein, and that the defendant recover its costs herein laid out and expended, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 8] IN CIRCUIT COURT OF POPE COUNTY

#1017

H. A. BAREFIELD, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENN., INC., Defendant

JUDGMENT—November 15, 1932

Now on this day this cause comes on for hearing, comes the plaintiff by his attorney John G. Rye and comes the defendant by its attorneys Cravens & Cravens and this case is submitted to the court upon the stipulations of the parties herein.

The Court being well and sufficiently advised in this cause renders judgment in favor of the plaintiff for $1625.00 with 12% penalty and $162.50 fixed as attorney's fees.

Defendant at the time excepts to said judgment of the Court.

It is therefore, considered, ordered, and adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant the said sum of $1625.00 with 12% penalty and $162.50 attorney's fees and all cost in this suit laid out and expended.

[fol. 9] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Nov. 15, 1932

Comes now the above named defendant and moves the Court to set aside the findings and judgment of the Court rendered herein on the 15th day of November, 1932, and to grant the defendant a new trial of the issues in this cause and for grounds therefor states:

First. Because the findings and judgment of the Court is contrary to law.

Second. Because the findings and judgment of the Court is contrary to the evidence.

Third. Because the findings and judgment of the Court is contrary to the law and the evidence.

Fourth. Because the findings and judgment of the Court is without sufficient evidence to support them.

Fifth. Because the findings and judgment of the Court is without any evidence to support them.

Sixth. Because the findings and judgment of the Court is contrary to the stipulation of facts filed herein by the parties.

Seventh. Because the findings and judgment of the Court herein are not supported by the stipulated facts filed herein.

Eighth. Because the court erred in allowing a penalty in favor of the plaintiff and against the defendant for the reason that the defendant in resisting plaintiff's claim had reasonable grounds and cause therefor and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of being vexatious or for delay, but upon a well-founded belief that the plaintiff was [fol. 10] not entitled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness of the defendant's refusal to pay, and without regard as to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law, and the fact that the plaintiff was not entitled to recover and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or

vexatious, and without regard as to whether the defendant's refusal to pay was based upon a well-founded belief, reasonably entertained under the facts, that the plaintiff was not entitled to recover, and that said Section of the Statute aforesaid, as so construed, deprives the defendant of due process of law and the equal protection of the law contrary to the provisions of the Constitution of the United States aforesaid, and the Constitution of the State of Arkansas as hereinabove set forth.

Ninth. Because the court erred in allowing plaintiff an attorney's fee for the reasons stated in item 8 hereof.

[fol. 11] Wherefore, premises considered, defendant prays that the findings and judgment of the Court rendered herein as aforesaid be annulled and set aside, and that it be granted a new trial herein, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 12] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—November 15, 1932.

Now on this day defendant files motion for new trial, which motion is by the court overruled, to which overruling by the court the defendant at the time excepts and prays an appeal to the Supreme Court, which is granted and is given 90 days to prepare and file Bill of Exceptions.

[fol. 13] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

Bill of Exceptions—Filed Dec. 5, 1932

STIPULATION OF FACTS

"It is agreed that the following are the facts in this case, and that this stipulation is submitted to the Court for de-

termination as to the liability of the defendant Company without any other evidence. It is accordingly agreed:

"1. That the facts are as stated in the complaint at law, filed by the plaintiff, and if the facts so stated make out a case of liability against the defendant in favor of the plaintiff, the Court is authorized to render a judgment against the defendant in favor of the plaintiff for the sum of One Thousand and Six Hundred Twenty Five ($1,625) Dollars, and penalty of 12% if the Court finds plaintiff is entitled to said penalty from the facts stipulated herein, subject to defendant's right to except and appeal to *to* the Supreme Court of Arkansas for a reversal of such judgment. If the judgment should be in favor of the defendant, the plaintiff shall have the right to except and to appeal to the said Supreme Court for a reversal of such judgment.

[fols. 14-29] "2. That policy No. 221659 sued on in this case, issued to Albert Barefield, is hereby filed as Exhibit 1 to this stipulation and made a part thereof to the same extent as if copied in full herein, thereby making each provision of said policy evidence in this case.

"3. Although it is agreed that each and every provision of said policy may be looked to in determining the liability under the policy, the following provisions are set out as applicable to such matters:

'Or if the Insured shall be the collision of or by any accident to any railroad passenger car, passenger steamship, public omnibus, street railway car, taxicab or automobile, stage or bus, which is being driven or operated at the time by a person regularly employed for that purpose, and in which such Insured *is regularly employed for that purpose, and in which such Insured is* traveling as a fare paying passenger or on which he is lawfully riding on a pass; or by the collision of or by any accident to any passenger elevator in which Insured is riding as a passenger; provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident.'

"4. It is agreed that all premiums had been paid on said policy, that all proper notices were given, and that said policy was in force at the time which the plaintiff alleges he was injured.

"As above stated, it is agreed that the above facts are true and are to be used as evidence by both parties.

"This 15th day of November, 1932.

"John G. Rye, Attorney for Plaintiff. Cravens & Cravens, Attorneys for Defendant."

[fol. 30] IN SUPREME COURT OF ARKANSAS

No. 3042

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

ALBERT BAREFIELD, Appellee

Appeal from Pope Circuit Court

JUDGMENT—June 26, 1933

This cause came on to be heard upon the transcript of the record of the circuit court of Pope county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this Court in this cause expended, and have execution thereof.

Opinion by Smith, J.; Kirby, J., dissents.

No petition for rehearing was filed.

[fol. 31] IN SUPREME COURT OF ARKANSAS

No. 57

LIFE AND CASUALTY INSURANCE CO. OF TENNESSEE

v.

BAREFIELD

OPINION—June 26, 1933

SMITH, J.:

This is a suit on an accident policy, and from a judgment in favor of the insured is this appeal.

The complaint alleged that the plaintiff was traveling north in a Ford coupe, in company with his son, when they met a large sedan traveling in the opposite direction at a high rate of speed, and just as the cars were passing the sedan ran over a stick and "flipped the said stick in the direction of the car in which the plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye. That the accident above referred to is covered by the terms of said policy; that said accident occurred while said policy was in full force and effect."

The cause was heard on a stipulation, which recited that "the facts are as stated in the complaint at law, filed by the plaintiff, and if the facts so stated make out a case of liability against the defendant in favor of the plaintiff, the court is authorized to render a judgment against the defendant in favor of the plaintiff for the sum of $1625.00, and penalty of 12% if the court finds plaintiff is entitled to said penalty from the facts stipulated herein, subject to defendant's right to except and appeal to the Supreme Court of Arkansas for a reversal of such judgment."

The stipulation incorporated the relevant portion of the policy sued on, which reads as follows: The appellant insures the plaintiff against the result of certain bodily injuries, including the loss of an eye "* * * if the insured [fol. 32] shall by the collision of or by any accident to any railroad passenger car, passenger steamship, public omnibus, street railway car, taxicab or automobile, stage or bus,

which is being driven or operated at the time by a person regularly employed for that purpose, and in which such insured is traveling as a fare paying passenger or on which he is lawfully riding on a pass; or by the collision of or by any accident to any private horse drawn vehicle or private motor driven car in which insured is riding or driving; or shall by any accident to any passenger elevator in which insured is riding as a passenger; provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident."

For the reversal of the judgment of the court below it is insisted that, under the stipulation as to the facts, there is no evidence that there was any "external or visible evidence on said vehicle of a collision or accident," as required by the policy, and also that no causal connection was shown between the loss of the eye and the accident to the car.

It appears, however, that there was an accident to the car. It was an accident within the meaning of the policy for the flying stick to strike the car, and in striking the car the stick was deflected so as to strike the plaintiff and cause the loss of his eye, and if it be said that there was left no external or visible evidence on the car of the accident, this provision was in the nature of an exception to the event insured against, to-wit, that the insured, while riding in one car, should be accidently injured through the operation of another. Plaintiff having made proof that he was so injured, the burden was upon the insurer to show that the case fell within an exception to the contract by which the [fol. 33] insurer had indemnified the insured against such an injury.

The rule appears to be that, when proof is made of damage apparently within a policy of insurance, the burden is on the insurer to show that the injury or damage was caused by an event from the occurrence of which the insurer had exempted itself from liability. The rule is stated at Section 599 of the chapter on Insurance in 14 R. C. L., page 1437, as follows: "Where proof is made of a loss apparently within a policy, the burden is on the insurer to prove that the loss arose from a cause for which it is not liable. Accordingly while the plaintiff in an action on an accident policy must prove that the death was caused by accidental means, yet where prima facie evidence of that

fact has been adduced, the defendant must show that the death of the insured resulted from an excepted cause."

The following, among other, decisions of this court are to the same effect: Grand Lodge A. O. U. W. v. Banister, 80 Ark. 190, 96 S. W. 742; Continental Casualty Co. v. Todd, 82 Ark. 214, 101 S. W. 268; Aetna Life Ins. Co. v. Taylor, 128 Ark. 155, 193 S. W. 540; Harrison v. Interstate Business Men's Acc. Assn., 133 Ark. 163, 202 S. W. 34; Mutual Life Ins. Co. of New York v. Raymond, 176 Ark. 879, 4 S. W. (2d) 536.

We are of the opinion also that there was such causal connection, under the provisions of the policy, between the accident and the injury as to sustain the judgment of the court. The flipping of the stick was clearly an accident. The stick was thrown against the car, and, after striking the car, was so deflected that it struck the plaintiff and injured him. That the stick did strike the car, and was deflected in so doing, is a fact which the parties have stipu- [fol. 34] lated to be true, and this stipulation, in our opinion, distinguishes the instant case from that of Life & Casualty Ins. Co. of Tennessee v. Whitehurst, 148 So. 162, decided by the Court of Appeals of Alabama, which was cited by appellant and relied upon as announcing the legal principle which should control our decision.

It is finally insisted that the trial court erred in assessing a penalty and attorney's fee in this case, for the reason that the insurer had defended in good faith under the belief that it was not liable. We have held, however, to the contrary. The plaintiff recovered the full amount sued for; indeed, there was a stipulation declaring the extent of the liability if the insurer was liable at all, and the fact that the assertion of non-liability was made in good faith is no valid defense to the assessment of a penalty and the allowance of an attorney's fee, as provided in Section 6155 Crawford & Moses' Digest. There was a review of what we regarded as the controlling authorities upon this subject in the recent case of Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, and we do not again review them.

As we construe the contract sued on, the judgment is correct, and it is, therefore, affirmed.

[fol. 35] IN SUPREME COURT OF ARKANSAS

ASSIGNMENTS OF ERROR MADE IN THE BRIEF OF APPELLANT FILED IN THE ARKANSAS SUPREME COURT

I

There is no evidence to support the judgment of the Court.

II

The Court erred in holding that the agreed state of facts as a matter of law imposed upon the appellant any liability whatsoever, especially the sum of Sixteen Hundred Twenty-five ($1,625.00) Dollars, with Twelve (12) Per Cent penalty and One Hundred Sixty-five ($165.00) Dollars attorneys' fees.

III

The Court erred in holding that the fact that a stick was hurled by a passing car against the automobile — which appellee was riding striking said car and consinuing, striking the appellee in the eye, constituted appellant liable to appellee for any sum under the terms of said policy. There was no evidence in the record or stipulations that there was any external or visible evidence on the vehicle in which appellant was riding of the collision or accident as provided by the terms of said policy, Tr., page 15, this providing being "provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident."

IV

There is no evidence in the record to support the judgment of the Court in assessing appellant with a penalty of Twelve (12) Per Cent and attorneys' fees of One Hundred Sixty-five ($165.00) Dollars under Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, and the assessing of the said penalty and the said attorneys' fees is a violation of the Fourteenth Amendment of the United States Constitution as the taking of property without due process of law and Article 1, Section 10 of said [fols. 36–41] Constitution forbidding the passage of laws impairing the obligations of contract, inasmuch as this

judgment for penalty and attorneys' fees was assessed against appellant merely because a judgment was rendered against it without any proof that in refusing to pay said claim and in contesting said claim in Court, appellant acted in bad faith, the said Section 6155 of Crawford and Moses' Digest being unconstitutional under the said Fourteenth Amendment, and under said Article 1, Sec. 10 of said Constitution.

[fol. 42] SUPREME COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Aug. 16, 1933

We are in receipt of the following letter from the Clerk of this Court:

"August 10, 1933.

"Moreau P. Estes, Esq., Nashville, Tenn.

"DEAR SIR: Mr. Justice Butler has today returned your appeal papers in the case of Life and Casualty Insurance Company of Tennessee v. Albert Barefield. The Justice wishes me to advise you that he considers your petition for appeal and assignments of error defective in that they do not 'show that the State Supreme Court was called on to decide and ruled adversely to appellant on the constitutional questions on which it here seeks reversal, and that the statement under rule 12 is not necesarily to be deemed a part of the petition or assignment.'

"Your appeal papers are returned to you herewith.

"Yours truly, Charles Elmore Cropley, Clerk, by
(Signed) H. B. Willey, Assistant.

"HBW-W.
"Encl."

As a matter of fact, the constitutionality of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, copied in full on page 2 of the original Petition for Appeal, Assignment of Errors, and Prayer for Reversal, was ex-

pressly raised in the Motion for a New Trial before the Trial Judge in the following words:

[fol. 43] "Eighth. 'Because the Court erred in allowing a penalty in favor of the plaintiff and against the defendant for the reason that the defendant in resisting plaintiff's claim had reasonable grounds and cause therefor and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of being vexatious or for delay, but upon a well-founded belief that the plaintiff was not entitled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness of the defendant's refusal to pay, and without regard as to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law, and the fact that the plaintiff was not entitled to recover and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford and Moses' Digest of the Statutes of Arkansas, and which said Sections, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard as to whether the defendant's refusal to pay was based upon a well-founded belief, reasonably entertained under the facts, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and the equal protection of —

"Ninth. Because the Court erred in allowing plaintiff an attorney's fee for the reasons stated in item 8 hereof."

In the Supreme Court of Arkansas, the petitioner, Life & Casualty Insurance Company of Tennessee, made the following assignment:

[fol. 44] "There is no evidence in the record to support the judgment of the Court in assessing appellant with a penalty of Twelve (12) Per Cent and attorney's fees of One Hundred Sixty-five ($165.00) Dollars under Section 6155 of Crawford and Moses' Digest of the Statutes of Arkansas, and the assessing of the said penalty and the said attorneys' fees is a violation of the Fourteenth Amendment of the United States Constitution as the taking of property without due process of law and Article 1, Section 10 of said constitution forbidding the passage of laws impairing the obligations of contract, inasmuch as this judgment for penalty and attorneys' fees was assessed against appellant merely because a judgment was rendered against it without any proof that in refusing to pay said claim and in contesting said claim in Court, appellant acted in bad faith, the said Section 6155 of Crawford and Moses' Digest being unconstitutional under the said Fourteenth Amendment, and under said Article 1, Section 10, of said Constitution."

In its written opinion, the Supreme Court of Arkansas expressly passed upon this assignment in the following words:

"It is finally insisted that the trial court erred in assessing a penalty and attorney's fee in this case, for the reason that the insurer had defended in good faith under the belief that it was not liable. We have held, however, to the contrary. The plaintiff recovered the full amount sued for; indeed, there was a stipulation declaring the extent of the liability if the insurer was liable at all, and the fact that the assertion of non-liability was made in good faith is no valid defense to the assessment of a penalty and the allowance of an attorney's fee, as provided in Section 6155 Crawford & Moses' Digest. There was a review of what we regarded as the controlling authorities upon this subject in the recent case of Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, and we do not again review them."

The Court will note that the Supreme Court of Arkansas states in its above decision that it has lately ruled on this

question adversely to the contention of appellant in Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, as follows:

[fol. 45] "It is contended in both cases that the 12 per cent damages and attorney's fee were erroneously assessed, and that under section 6155, Crawford & Moses' Digest, no damages and attorney's fee should be assessed where defense is made in good faith and refusal to pay is based upon an honest and fairly debatable difference of opinion as to the law involved. It is conceded by appellant that this court has already taken a contrary view of the matter in Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581, and, it is insisted, as thus construed, the above statute runs counter to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. We do not agree with appellant in this regard, and we think the Supreme Court of the United States has decided the question adversely to appellant's contention. Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 S. Ct. 126, 133, 47 L. Ed. 204. Both of these cases construed the Texas statute, which is substantially the same as ours, requiring life and health insurance companies who shall default in payment of their policies to pay 12 per cent damages, together with reasonable attorney's fees, not to be in violation of the Fourteenth Amendment. In the latter case, Mr. Justice McKenna, speaking for the court, said: 'Notwithstanding our decision in Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 46 L. Ed. 922, 22 S. Ct. 662, the plaintiff in error urges the unconstitutionality of the Texas statute, authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning.' See Hartford Fire Ins. Co. v. Wilson & Toomer Fertilizer Co. (C. C. A.) 4 F. (2d) 835, certiorari denied 268 U. S. 704, 45 S. Ct. 639, 69 L. Ed. 1167.

"Moreover, this statute is a part of the insurance laws of this state, and has been since 1905. It is one of the conditions under which insurance companies are authorized to do business in this state, and, by transacting business here, such companies impliedly at least agree to be bound by the act. Fidelity Mutual Life Ins. Ass'n v. Mettler,

supra; American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. 2, 39 S. Ct. 431, 63 L. Ed. 810."

[fol. 46] From the above it appears that the appellant has contended in its motion for a new trial and in its assignment of errors in the Supreme Court of Arkansas that the said Section 6155 of Crawford & Moses' Digest is unconstitutional when applied to a state of facts showing that the defendant insurance company acted in good faith in refusing to pay the claim and in defending the suit, and the above quotation from the Arkansas Supreme Court's opinion in this case shows without doubt that they passed upon the question and expressly held the statute constitutional when applied to a case in which there was no evidence of bad faith either in the refusal to pay the claim or in the defense of the suit.

It will be noted that the Arkansas Supreme Court in the above case states that the constitutionality of this statute as applied to cases showing no bad faith is settled in Fidelity Mutual Life v. Mettler, 185 U. S. 308.

The above case was decided on two questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of Security Mutual Life v. Pruitt, 202 U. S. 264, 50 L. Ed. 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in Terral v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 3[illegible], this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In Mortensen v. Security Insurance Company, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition

that an insurance company should not remove a case from a State to a Federal Court.

[fol. 47] These cases settle the proposition that an insurance company has the constitutional right under the Fourteenth Amendment to resort to a Federal Court, and the question here presented is whether or not an insurance company may be denied the right to resort to a State Court where its act in refusing to pay and in resorting to Court was not in bad faith.

In the case of McCray v. Life & Casualty Insurance Company of Tennessee, now pending on appeal and set for argument next November or December on the docket of the Supreme Court of the United States, the Arkansas Supreme Court recognizes the fact that the United States Circuit Court of Appeals for the Eighth Circuit in which Arkansas is located, has held this penalty statute of Arkansas unconstitutional when applied to cases lacking the element of bad faith, as shown by the following language:

"* * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statutes. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

As aforesaid, Arkansas is located in the Eighth Circuit and a direct conflict on the question of the constitutionality of this statute between these Courts ought to be settled by a decision of this Court. Otherwise, the law relating to the matter in that jurisdiction will be in a chaotic condition.

The question in this case, that is, the constitutionality of the statute creating a penalty against an insurance company merely because a judgment might be rendered against it, where there was no element of bad faith, was not presented in Fidelity Mutual v. Mettler, supra.

[fol. 48] We, therefore, submit that the case of Fidelity Mutual Life v. Mettler, supra, relied upon by appellee is no longer applicable so far as relates to the right of an in-

surance company to resort to any Court in order to defend a suit in good faith.

In the case of Mystic Circle v. Snyder, 227 U. S. 500, 57 L. Ed. 614, this exact point was before the Court. The exact point here presented was before the Court and this Court held the Tennessee Insurance Penalty Statute valid for the reason that it only imposed the penalty where the defense was made in bad faith.

We ask that this supplement be taken as a part of the original Petition for Appeal, Assignment of Errors, and Prayer for Reversal, hereto attached.

P. M. Estes, Myron T. Nailling, Attorneys for Appellant, Life & Casualty Insurance Company of Tennessee. Moreau P. Estes, of Counsel.

[fol. 49] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL

Petition for Appeal

Considering itself aggrieved by the decision of the Supreme Court of the State of Arkansas in the above styled cause, the appellant herein, Life & Casualty Insurance Company of Tennessee, hereby prays that an appeal may be allowed to the Supreme Court of the United States herein, and have an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Life & Casualty Insurance Company of Tennessee assigns the following errors in the record and proceedings in said case:

1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the

policy, and that Court erred in rendering any judgment against appellant.

3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas, in fact, it relates only to the degree of evidence essential to liability under the policy, [fol. 50] and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees of One Hundred Sixty Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy

and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates the said Fourteenth Amendment of the Constitu-
[fol. 51] tion of the United States.

5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees for One Hundred Sixty Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonable or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of Woodson v. Railroad, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Date of Decree

The date of the final judgment in the Supreme Court of Arkansas is June 26, 1933.

Application for Appeal

Application for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Arkansas on June 12, 1933, and was denied by him on July 19, 1933. This fact is shown by letter attached hereto from W. P. Sadler, Clerk of the Supreme Court of Arkansas.

[fol. 51a] SUPREME COURT, STATE OF ARKANSAS

Jesse C. Hart, Chief Justice. Frank G. Smith, T. H. Humphreys, William F. Kirby, Tom M. Mehaffy, E. L. McHaney, Turner Butler, Associate Justices.

Wm. P. Sadler, Clerk. Carl R. Stevenson, Deputy.
Ashton G. Sadler, Deputy.

Little Rock, July 19, 1933.

Mr. Moreau P. Estes, Asso. Gen. Counsel, Life & Casualty Ins. Co., Nashville, Tennessee.

DEAR SIR: Chief Justice C. E. Johnson has on this date, denied your prayer for an appeal to the United States Supreme Court in the case of Life & Casualty Ins. Co. v. Barefield, No. 3042.

Yours truly, W. P. Sadler, Clerk, by A. G. Sadler, Deputy.

[fol. 52] Prayer for Reversal

For which errors the appellant, Life & Casualty Insurance Company of Tennessee, prays that the said judgment (or decree) of the Supreme Court of the State of Arkansas, dated June 26, 1933, in the above entitled cause, be reversed and a judgment (or decree) rendered in favor of the said appellee, and for costs.

P. M. Estes, Myron T. Nailling, Solicitors for Appellant. Moreau P. Estes, of Counsel.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. —

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

ALBERT BAREFIELD, Appellee

ORDER ALLOWING APPEAL—Aug. 17, 1933

The appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment (or decree) made and entered in the above entitled cause by the Supreme Court of the State of Arkansas on the 26th day of June, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the Rules of the Supreme Court of the United States in such case made and provided;

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Arkansas shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty (40) days of this date.

And it is further ordered that security for judgment and costs on appeal be fixed in the sum of $2,500.

Dated this 17th day of August, 1933.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

[fol. 54] Citation, in usual form, showing service on John G. Rye et al., omitted in printing.

[fols. 55-60] Bond on appeal for $2,500, approved and filed, omitted in printing.

[fol. 61] Certificate of lodgment omitted in printing.

[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 63] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 6, 1933

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point 1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

Point 2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the policy, and that Court erred in rendering any judgment against appellant.

Point 3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas, in fact, it relates only to the degree of evidence essential to liability under the policy, and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

This holding of the Supreme Court of Arkansas violates appellant's rights under the due process clause of the Four-

[fol. 64] teenth Amendment of the Federal Constitution and its rights under Section 10 of Article 1 of the Federal Constitution prohibiting the impairing of the obligations of contract.

Point 4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees of One Hundred Sixty Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates

the said Fourteenth Amendment of the Constitution of the United States.

Point 5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five [fol. 65] (195) Dollars, and attorney's fees for One Hundred Sixty Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonably or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

Point 6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of Woodson v. Railroad, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Section 10, Subsection 1 of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

Point 7. Said Section 6155 of Crawford & Moses' Digest of Arkansas is also unconstitutional under Section 10 of Article 1 of the Federal Constitution in that it makes the appellant liable for the said 12% damages of $195 and said attorney's fees of $162.50, when there is no provision in the policy contract sued on providing for such payments or justifying the allowance of such amounts.

[fols. 66 & 67] And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

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Agreed Statement of Facts	13-14
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P. M. Estes, Counsel for Appellant, Life & Casualty Insurance Company of Tennessee.

We acknowledge service of the above "Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed", together with copy thereof for our use.

This 21 day of September, 1933.

John G. Rye, J. B. Ward.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 38,112. Arkansas Supreme Court. Term No. 509. Life & Casualty Insurance Company of Tennessee, appellant, vs. Albert Barefield. Filed October 6, 1933. File No. 509, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

ALBERT BAREFIELD, APPELLEE.

STATEMENT OF JURISDICTION AS REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Jurisdiction.

The Act of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

The Supreme Court of Arkansas is the highest court in that State and the judgment sought to be appealed from is final.

Date of Decree.

The date of the final judgment in the Supreme Court of Arkansas is June 26, 1933.

Application for Appeal.

Application for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Arkansas on July 12, 1933, and was denied by him on July 19, 1933.

(The appeal was allowed by Mr. Justice Butler on August 17th.)

Statement.

This suit was brought by appellee, Albert Barefield, against appellant, Life & Casualty Insurance Company of Tennessee, to recover upon a Travel and Pedestrian Accident Policy and a recovery was had for the sum of $1,625. There was added to this judgment the sum of $162.50 and 12 per cent penalty of $195.

The said attorney's fees and penalty were added to this judgment under the provision of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, which is as follows:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the court where the same is heard on original action, by

appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law, collected."

The construction placed by the Supreme Court of Arkansas upon this statute was that it imposed these penalties upon your petitioner without reference to whether or not it acted in good faith in refusing to pay and in defending the suit. Your petitioner contended before the Supreme Court of Arkansas and now contends that this statute thus construed violates the Constitution of the United States in two particulars: (1) it violates Article 1, Section 10, forbidding the passage of any law "impairing the obligations of contracts"; and (2) the Fourteenth Amendment forbidding any State to "deprive any person of life, liberty or property, without due process of law."

As applied to Article 1, Section 10, your petitioner contends that requiring it to pay the sum of One Hundred Ninety-Five (195) Dollars in addition to the amount of Sixteen Hundred Twenty-Five (1625) Dollars imposed by the contract, is impairing the obligation of the contract, and that placing a penalty upon your petitioner merely because a judgment might be rendered against them is denying your petitioner of the right to resort to courts in a defense of a claim to which it believes it has an honest defense. The very essence of the Fourteenth Amendment is the right in good faith to take any controversy to courts because it is only in courts and by courts that due process may be had.

This exact question is pending before the Supreme Court of the United States now in the case of *Life & Casualty Insurance Company of Tennessee* v. *Ossie McCray* (No. 89, October Term, 1933), in which the appeal was first refused by the Chief Justice of the Supreme Court of Arkansas and was then granted by Associate Justice Butler of the Supreme Court of the United States on April 21, 1933.

There is one point of importance that makes this appeal necessary in order to squarely present this question.

In the McCray case the question was whether or not after a policy had lapsed and was reinstated the policy began to run anew from the date of the reinstatement and that thereafter in all relations between the company and the assured the date would be reckoned from the date of the reinstatement and not from the original date on the policy.

The appellee in the McCray case contended that prior to the time that the McCray suit was brought against the Life & Casualty Insurance Company the Supreme Court of Arkansas in the cases of *New York Life Insurance Company* v. *Adams,* 155 Ark. 123; *Equitable Life* v. *King,* 178 Ark. 293, and *Security Life Insurance Company* v. *Leeper,* 171 Ark. 77, had definitely settled this question against the contentions of this company and accordingly their act in refusing to pay the claim was in bad faith.

In the present case there is no contention that the Supreme Court of Arkansas prior to this case had ever decided the principle of law involved and accordingly the element of bad faith in refusing to pay the claim is entirely lacking in this case. It may be that the Supreme Court of the United States on the McCray appeal may view the case from the contention of the appellee McCray and hold that the refusal to pay was in bad faith because the question had theretofore been decided by the Supreme Court of Arkansas, and consequently not pass upon the constitutionality of Section 6155 of Moses & Crawford's Digest of the Statutes of Arkansas, which is the object of this appeal.

Accordingly, appellant has deemed it wise also to appeal this case so that it can be assured that the constitutionality of the above statute will be passed upon. Also in this case

there is presented for consideration the first time so far as the Supreme Court of Arkansas is concerned, the question that the judgment of the lower court and of the Supreme Court of Arkansas in the present case is totally void because it is not supported by any evidence whatever under the authority of *Woodson* v. *Railroad,* 134, U. S. 661, 33 L. Ed. 1032, and *Windsor* v. *McVeigh,* 93 U. S. 274. The point of this contention is based upon the fact that the policy provides that before any liability can attach the accident must leave some external and visible marks upon the car of the injury and the record in the case and the opinion of the Supreme Court of Arkansas show that there is no evidence on this point whatever in the record and consequently the said judgment is void and unconstitutional under the above cases.

As pointed out in the McCray case, the United States Court of Appeals for the 8th Circuit has held this statute unconstitutional if applied to a state of facts showing an absence of bad faith in the refusal to pay the claim, and this presents a conflict between two courts of the highest jurisdiction covering the same territory, one State and the other Federal, and thus resulting in the utmost confusion.

That the Supreme Court of Arkansas recognizes the fact that its construction of this statute is directly opposed to the construction placed upon it by the said Circuit Court of Appeals for the 8th Circuit, is shown by the following quotation from the opinion of the court in the McCray case:

> "• • • assuming appellant defended in good faith, this does not excuse it from the plain provision of the statute. *Security Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581; *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in *Standard Acc. Ins. Co.* v. *Rossi,* 35 Fed. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy,* 38 Fed. (2d) 557.

This question is now settled and we decline to reconsider the matter."

Authorities Sustaining Jurisdiction.

Act of Congress, February 13, 1925; 43 Stat. 937; U. S. Comp. Stat. Sec. 1214, giving the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

Supreme Ruling of Mystic Circle v. *Snyder*, 227 U. S. 497, holding the Tennessee insurance penalty statute constitutional on the ground that it did not merely give the penalty for an unsuccessful defense, but where the defense was made in bad faith.

Standard Life Ins. Co. v. *Rossi*, 35 F. (2d) 667, and *Inter-Southern Life Insurance Company* v. *McElroy*, 38 F. (2) 557, holding Section 6155 of Crawford & Moses' Digest of Arkansas unconstitutional if applied to cases not showing bad faith.

Fourteenth Amendment of the Federal Constitution, forbidding the taking of property without due process of law, which means that every litigant has the constitutional right to litigate any question so long as he acts in good faith.

Respectfully submitted,

P. M. ESTES,
MYRON T. NAILLING,
Solicitors for Appellant,
Life & Casualty Insurance Company of Tennessee.

MOREAU P. ESTES,
Of Counsel.

FILE COPY

FILED
NOV 16 1939

IN THE

Supreme Court of the United States

No. 509

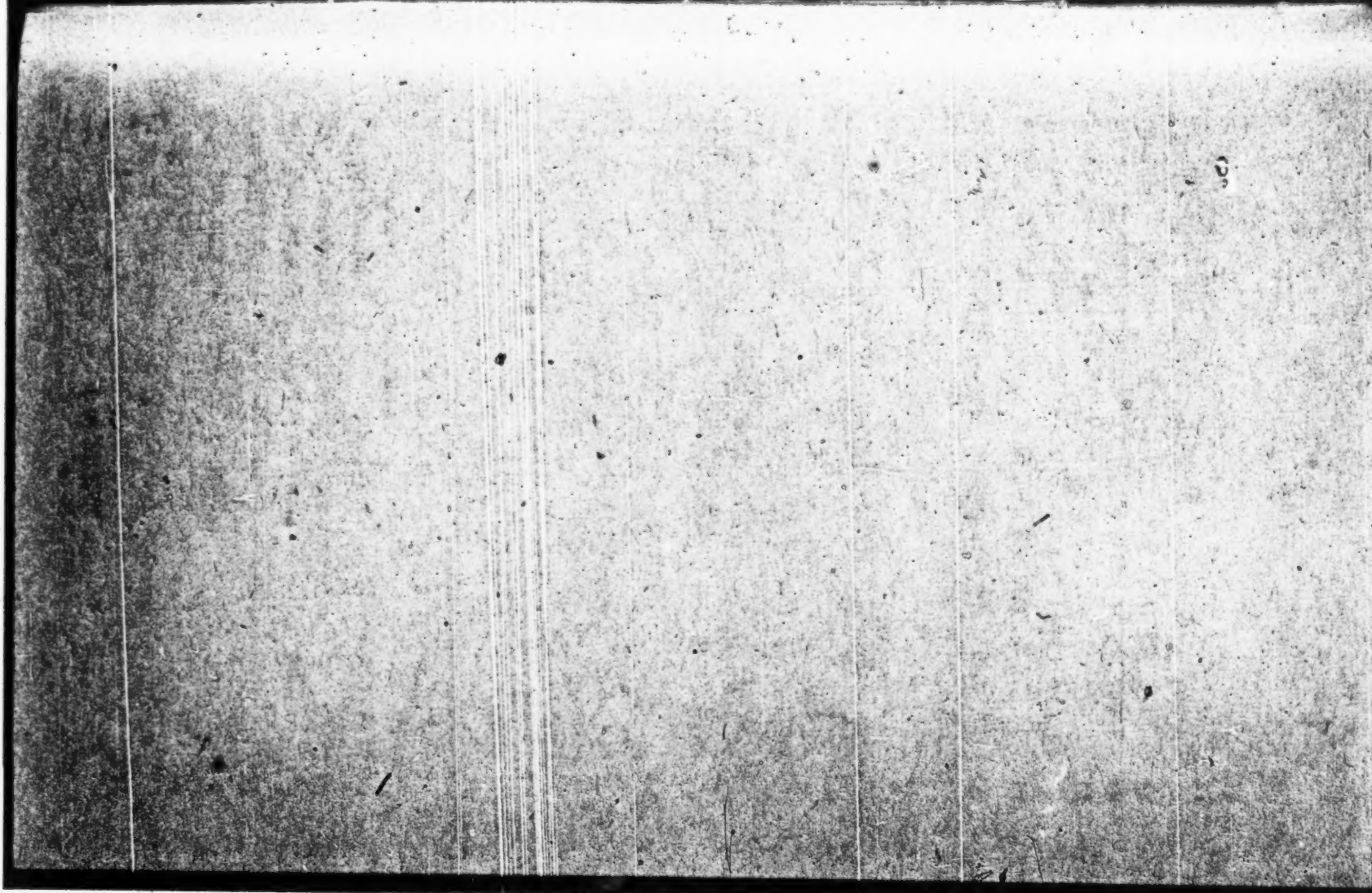
LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

ALBERT BAREFIELD, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

MOREAU P. ESTES,
P. M. ESTES,
MYRON T. NAILLING,
Attorneys for Appellant,
Life & Casualty Insurance Company
of Tennessee.



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IN THE

Supreme Court of the United States

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

ALBERT BAREFIELD, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

I.

THE OPINION OF THE COURT BELOW

The opinion in the Arkansas Supreme Court has not been officially reported, but is copied in full in the record.

II.

JURISDICTION

The statement of jurisdiction as required by paragraph 1 of Rule 12 of the Supreme Court of the United States, has heretofore been filed and printed, and reference is here made to it as fully as if it were herein copied in full.

III.

STATEMENT OF CASE

The appellee, Albert Barefield, was accidentally injured on February 25, 1932, while riding in a private motor driven

automobile by being struck with a stick, which was "flipped" in the direction of the car in which the said Barefield was riding, striking the car at the front of the left hand door and then continuing striking the said Barefield in the right eye, causing a total and irrecoverable loss of the sight of said eye. There is no proof in the record of *any injury* to the automobile. At the time of this injury, he was insured under a Travel and Pedestrian Accident Policy issued by the appellant. The premium on this policy was Five ($5) Dollars and for the loss of one eye, the amount due if covered by the policy was the sum of $1,625.00. The premiums were paid on this policy at the time of the accident and there was liability under the policy provided the facts of the case made out an accident within the terms of the policy. The policy is copied into the record.

The appellee claims that the appellant is liable to him under the terms of the policy providing liability where he is injured "*by* the collision of or *by any accident* to any private horse-drawn vehicle or private motor driven car in which the insured is riding or driving." The case was heard upon stipulations which are set out in the Bill of Exceptions. The question, therefore, is whether the policy covers the loss of the eye to said Barefield where the facts are that a passing automobile "flipped" a stick which struck the automobile in which Barefield was riding and then continuing, striking the said Barefield in the eye, causing its loss, but not causing *any injury* to the automobile.

We particularly call the Court's attention to the fact that the complaint or declaration filed by the appellee does not allege that the stick in striking the automobile caused any "external or visible injury" on the automobile as provided by the terms of the policy. In other words, the policy requires three

things: (1) there must be an accident to the automobile; (2) this accident must cause the injury to the assured; and (3) the accident must leave on the automobile "some external or visible injury".

If any one of these elements is lacking, there can be no liability. The declaration or complaint in failing to allege that the accident left "some external or visible injury" on the automobile did not state a cause of action, and, accordingly, under well-known rules of law hereafter set out, any judgment rendered thereon would be absolutely void.

The Circuit Court held appellant liable, and this judgment was affirmed by the Arkansas Supreme Court. Appeal to this Court was prayed and was refused by the Arkansas Chief Justice, but was granted by Mr. Justice Butler of the Supreme Court of the United States.

IV.

SPECIFICATION OF ERRORS

1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the policy, and that Court erred in rendering any judgment against appellant.

3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas ,in fact, it relates only to the de-

gree of evidence essential to liability under the policy, and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

This holding of the Supreme Court of Arkansas violates appellant's rights under the due process clause of the Fourteenth Amendment of the Federal Constitution and its rights under Section 10 of Article 1 of the Federal Constitution prohibiting the impairing of the obligations of contract.

4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety-Five (195) Dollars, and attorney's fees of One Hundred Sixty-Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates the said Fourteenth Amendment of the Constitution of the United States.

5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety-Five (195) Dollars, and attorney's fees for One Hundred Sixty-Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonably or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and

the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of *Woodson* v. *Railroad*, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Section 10, Subsection 1 of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

7. Said Section 6155 of Crawford & Moses' Digest of Arkansas is also unconstitutional under Section 10 of Article 1 of the Federal Constitution in that it makes the appellant liable for the said 12% damages of $195 and said attorney's fees of $162.50, when there is no provision in the policy contract sued on providing for such payments or justifying the allowance of such amounts.

The above specification of errors are identical with the statement of the points upon which appellant gave notice that it intended to rely in this Court.

V.

ARGUMENT

SUMMARY OF ARGUMENT

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1 Section 10 of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

Point B

The policy expressly provides that in order for there to be liability there must be "some external or visible injury" on the automobile. The complaint or declaration does not allege nor is there any fact in the record showing any "external or visible injury" on the automobile. Accordingly, the judgment is void because based upon a declaration or complaint showing no cause of action and upon a record containing no evidence of liability.

Point C.

The Arkansas Supreme Court erroneously held that although there was no evidence in the record of any "external or visible injury" to the automobile, yet this was an excepted cause and the burden of proof to show such fact was upon appellant, and the record being silent upon the subject, the Court would infer the fact that there was some "external or

visible injury" to the automobile, caused by the alleged accident. This case was tried upon stipulated facts and the Arkansas Supreme Court was bound by such facts as stipulated by the parties, and the stipulation containing no fact of any "external or visible injury" to the automobile, the Arkansas Supreme Court was without constitutional power under the Fourteenth Amendment to add to the stipulation a fact without which under its own opinion and judgment, there could be no recovery.

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1, Section 10, of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

This Court had before it, in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, notwithstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is,

we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal to pay* sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case considered the very point presented in this case, we quote the following:

"The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted 'additional expense, loss, or injury'* upon the policyholder, and it is this *further expense, loss or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.

"It cannot be said that this effort to give indemnity for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

This Court also had this question before it as applied to the right to resort to Federal Courts in the cases of *Terral* v. *Burke Construction Company*, 257 U. S. 529, 66 L. Ed. 352, and *Mortensen* v. *Security Insurance Company*, Adv. Sheets, Vol. 77, No. 11, 673.

In *Terral* v. *Burke Construction Company*, supra, this Court held that a legislative act denying to a foreign corporation, under the penalty of the cancellation of its license, the right to resort to a Federal Court or to remove a case to a Federal Court was unconstitutional.

In *Mortensen* v. *Security Insurance Company*, supra, this Court applied this same principle of law to a State anti-removal statute as applied to a foreign insurance company and held the statute unconstitutional.

These two last cases clearly hold that a State statute having for its object the denial of the right to a litigant to resort to a Federal Court is unconstitutional under the Fourteenth Amendment, and likewise for the same reasons, it is clear that the same rules of law would apply to the right of a citizen to apply to State Courts either in the assertion of or in the defense of any right which it, in good faith believes, constitutes a good cause of action or a good defense.

This is the view taken of this Arkansas penalty Statute by the United States Circuit Court of Appeals of the Eighth Circuit in the cases of *Standard Accident Insurance Company* v. *Rossi*, 35 F. (2) 667, and *Intersouthern Life Insurance Company* v. *McElroy*, 38 Fed. (2) 557, in which the Court expressed the opinion that this penalty statute was unconstitutional when applied to cases where the refusal to pay or the defense of the suit was not in bad faith. Showing that the

Arkansas Supreme Court recognized the law on this question as laid down by the United States Circuit Court of Appeals for the Eighth Circuit, the following is copied from its opinion in the present case, Record, page 19:

> " * * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Intersouthern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

We, therefore, submit that this penalty statute of Arkansas is unconstitutional in toto because it makes no provision for excepting those cases where the refusal to pay the claim or the defense of the suit was not in bad faith; if not in toto, then it is unconstitutional as applied to a case showing no evidence of bad faith in refusing to pay the claim or in resisting its payment in Court.

The appellee in its brief, submitted in support of its motion to dismiss this appeal, relied upon the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S. 308, *Iowa Life* v. *Lewis*, 187 U. S. 335, *Home Life* v. *Fisher*, 188 U. S. 528, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S. 301. None of these cases considered the questions here involved, but were decided upon two other questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S. 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that an insurance company would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise, the case of *Sioux County* v. *National Security Co.*, 276 U. S. 239, 72 L. Ed. 549, likewise relied upon by appellee, has no bearing upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided *what costs* should be taxed against litigants in the Federal Court, a

State statute in reference to costs would have no application. This Court reversed the Court of Appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated exclusively by Rev. Stat., Sec. 823 and 824, the Court concluded that other costs authorized only by a State statute, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its bad faith in denying payment of the claim and resisting suit in Court.

When we considered that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts honestly and in good faith is the very essence of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to tax or the right to regulate is the right to destroy, and, accordingly, if a State Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and deny such company the right to resort to Courts at all either in the assertion or defense of its rights. If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

Point B

The policy expressly provides that in order for there to be liability there must be "some external or visible injury" on the automobile. The complaint or declaration does not allege nor is there any fact in the record showing any "external or visible injury" on the automobile. Accordingly, the judgment is void because based upon a declaration or complaint showing no cause of action and upon a record containing no evidence of liability.

The following cases hold that where a declaration or complaint sets out no cause of action, the Court cannot render a judgment thereon, and any judgment rendered on such a complaint or declaration is absolutely void, even though the case might have been solemnly tried in Court, and no appeal taken from the judgment.

> *U. S. v. Northern Pacific*, 177 U. S. 435, 44 L. Ed. 836.
> *Wills* v. *Claflin*, 92 U. S. 135, 23 L. Ed. 490.
> *Bank* v. *Smith*, 11 Wheat. 171, 6 L. Ed. 453.
> See 21, R. C. L., Section 148, page 603.

The judgment in this case is accordingly void and the enforcement of any void judgment constitutes a violation of the Due Process Clause of the Fourteenth Amendment.

There is absolutely no fact in the record showing that there was any "visible or external injury" to the car caused by the alleged accident, and accordingly, the judgment rendered in this case on a record showing no evidence of liability is void and unconstitutional under the Due Process Clause of the Fourteenth Amendment. This exact question was before this Court in the case of *Woodson* v. *Railroad*, 134 U. S. 614, 33 L. Ed., 1038, wherein this Court expressly held that a

judgment of the Tennessee Supreme Court supported by no evidence was void under the Fourteenth Amendment. The Court is also asked to read the case of *Mahoney* v. *Railroad*, 89 Tenn. 311, wherein the Tennessee Supreme Court reviewed the Woodson case and recognized that it laid down the rule that a judgment supported by no evidence was absolutely void and unconstitutional under the Fourteenth Amendment. The Woodson case originated in the Circuit Court of Haywood County, Tennessee, and was tried twice before a Court and jury and a judgment rendered for the plaintiff each time. It was tried a third time before a Court and jury and again a verdict was rendered for the plaintiff in which the Circuit Judge, although holding that there was no evidence to support the verdict, nevertheless held that he was bound to affirm it under the Tennessee statute forbidding the Court to set aside a third verdict on the facts. The case was appealed to the Tennessee Supreme Court and there affirmed, the Court holding that although there was no evidence to support the verdict it was required to affirm the verdict under the Tennessee statute forbidding the Court to set aside a third verdict on the facts.

The case was carried to the Supreme Court of the United States on a writ of error and this Court held that the statute was constitutional when applied to a judgment supported by some evidence, but that it was unconstitutional when applied to a judgment supported by no evidence and that a judgment supported by no evidence was void and unconstitutional under the Fourteenth Amendment. In this case, there being no evidence of any "visible or external injury" to the automobile, as required by the terms of the policy, the judgment rendered in this case is unconstitutional and void under the Due Process Clause of the Fourteenth Amendment.

This Court in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, reached the same conclusion by a different line of argument, wherein it held that where a party was denied the right to introduce evidence, it was equivalent to the withdrawal of service of process and the judgment unconstitutional and void.

Point C

The Arkansas Supreme Court erroneously held that although there was no evidence in the record of any "external or visible injury" to the automobile, yet this was an excepted cause and the burden of proof to show such fact was upon appellant, and the record being silent upon the subject, the Court would infer the fact that there was some "external or visible injury" to the automobile, caused by the alleged accident. This case was tried upon stipulated facts and the Arkansas Supreme Court was bound by such facts as stipulated by the parties, and the stipuation containing no fact of any "external or visible injury" to the automobile, the Arkansas Supreme Court was without constitutional power under the Fourteenth Amendment to add to the stipulation a fact without which, under its own opinion and judgment, there could be no recovery.

The Arkansas Supreme Court held that there was no evidence in the record of any "external or visible injury" to the automobile, and, accordingly, under the record, judgment ought to have been rendered for the appellant, dismissing the suit, but it erroneously held that the provision requiring "external or visible injury" to the automobile was an excepted cause and there being no evidence in the record one way or the other on the subject, the Court would infer that in fact there was an "external or visible injury" to the car, as re-

quired by the policy, and on this ground alone affirmed the judgment of the Court.

This means that the judgment could not have been affirmed by the Arkansas Supreme Court unless it had added the essestial fact showing an "external or visible injury" to the car. Parties have the constitutional right to have their interest determined by the record in the case, and no Court may constitutionally under the Fourteenth Amendment add to the record a fact essential to a recovery. If that were true, records would be of no value. Hearing cases on stipulated facts is an established practice in all Courts and means that the parties agree that certain facts are true, and on these facts the judgment of the Court is asked. If a Court, in order to reach a different result, may add an essential fact to a stipulation, it destroys the legal effect of the stipulation entirely. It may be that such fact added by the Court is not true. The presumption is that the parties are represented by capable counsel and that each fact has been placed in the stipulation that was available and where a fact is left out there is a conclusive presumption that no such fact existed.

In *Birmingham Post Company* v. *Sturgeon*, (Ala.), (Supreme Court), 149 So. 74, No. 1, Advance Sheets, July 27, 1933, the Court held that where a pertinent fact is omitted from a stipulation it is presumed that no such fact existed. See also *Saltonstall* v. *Russell*, 152 U. S. 629; 36 Cyc. 1283; and 60 Corpus Juris, 69, Section 51.

Another proposition to which we wish to sharply call the attention of the Court is that there being no evidence of any "external or visible injury" to the automobile, the legal effect of the judgment of the Arkansas Supreme Court is to strike out the provision of the policy providing for such "external or

visible injury" to the automobile, as a condition precedent to liability.

Where parties have entered into a contract and the language used is *free from ambiguity*, no Court can constitutionally construe said contract so as to ignore the plain meaning of the provision, as placed in the contract by the parties.

Vol. 8, Cyc., page 933 (d):

"*Judicial Decisions.*—Where parties have entered into a contract valid at the time under the laws of the State it is not competent for the Courts of the State to impair the obligation of that contract," citing the following authorities:

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S., 558; 20 S. Ct., 736, 44 L. Ed., 886.

Houston, etc., R. Co. v. *Texas*, 177 U. S., 66, 20 S. Ct., 545, 44 L. Ed., 672.

Louisiana v. *Pilsbury*, 105 U. S., 178, 26 L. Ed., 1090.

Chicago v. *Sheldon*, 9 Wall. (U. S.), 50; 19 L. Ed., 594.

Butz v. *Muscatine*, 8 Wall, (U. S.), 575, 19 L. Ed., 490.

Thompson v. *Lee County*, 3 Wall, (U. S.), 327, L. Ed., 177.

Union Bank v. *Geary*, 5 Pet. (U. S.), 99, 8 L. Ed., 60.

This rule was very clearly stated in the following words by the Supreme Court of Alabama, in *Life & Casualty Insurance Company of Tennessee* v. *Whitehurst*, not yet officially reported, decided March 30, 1933:

"It is true that insurance policies should be liberally construed to effect the intentions of the parties, and in cases of doubt a contract will be construed most strongly

against the party who framed it, yet the function of courts is to construe them, not to make them.

"In 14 R. C. L., pp. 928-929, the rule is stated, with citation of numerous authorities to support it, that: 'In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability, and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts, or to take anything from them.'

"And our own Court, in the recent case of *Life and Casualty Ins. Co. of Tenn.* v. *Tollison*, 223 Ala., 78, 135 So., 805, gave its approval to the above stated language: 'We approve, as of course the rule that insurance contracts may be and often are made with very limited coverage, the small premium fixed on careful calculation of the hazard assumed; and they should be enforced, not a new or enlarged contract made for the parties.'"

The fact that the Arkansas Supreme Court bases its decision upon the ground that the provision requiring "external or visible injury" on the automobile was an excepted cause, is not material; for this is a matter of the use of words or construction which varies and changes the plain meaning of the contract. The provision requiring "external or visible injury" to the automobile is *not an accepted cause,* and relates to the *degree of evidence* required before liability can attach. Such an agreement is valid and violates no public policy. Accordingly, it cannot be read out of the policy under constitutional limitations merely by stating that it constituted an excepted cause. Whether or not it is an excepted cause is also not material, for the reason that the *facts are stipulated* and the stipulation contains *no statement* that there was "external or visible" injury on the car. Where facts are stipulated by the parties, the law in reference to burden of proof has no appli-

cation, it being presumed that the whole facts in issue between the parties are in the stipulation without reference to questions of burden of proof.

The evidence in the record shows that the injury to appellee's eye was caused by the stick striking it. The stick was put in motion by the passing car and not the car in which he was riding. Accordingly, the accident to the car in which he was riding did not cause the injury to the eye.

The case of *Life & Casualty Insurance Company of Tennessee* v. *Whitehurst*, decided by the Supreme Court of Alabama on March 30, 1933, was upon almost identical facts and the Court held that no liability could attach unless the injury was caused by the accident. The following is copied from the opinion:

> "The evidence upon which the case was submitted shows that the insured at the time of the fatal accident was riding in an automobile on a public highway, in Mobile County, and that she was shot by a deputy sheriff; that there was no intention on the part of the officer to shoot the insured; that the bullet which struck her was fired 'at, through and into said automobile for the purpose of disabling the automobile and causing it to stop.' A number of shots 'were fired at the rear tires and the gasoline tank.' And one of the bullets 'pierced the glass window forming a part of the back of the automobile and struck insured in the back of the head.' It was this bullet that caused her death. In piercing the rear of the automobile, the bullet which struck the insured 'caused and left external and visible evidence of the accident on the automobile.'
>
> "From the foregoing statement of the evidence only one logical conclusion can be reached, and that is that the

bullet was the sole proximate cause of the death of the insured, and *not the accident* to the automobile. It is perfectly apparent that the bullet fired from the pistol operated to produce the death of the insured without the intervention of any independent or unforeseen cause or event, without which the injury could not have occurred. This being true, the firing of the bullet, and the bullet were the proximate cause of the death of the insured."

Another fact which we wish to emphasize is that under this accident policy, there could be no accident to the car without an injury to the car. If there was no injury to the car, the accident would have been harmless, and could not have resulted in any injury to plaintiff's eye. Generally speaking, there is no such thing in law as an accident without an injury, but certainly under this policy it is clear that if no injury was inflicted upon the car, the injury to appellee's eye could not have been caused by the accident.

For these reasons, also, we state that the legal effect of the judgment of the Arkansas Supreme Court was to take out of the contract entirely the provision requiring "external or visible" injury to be on the car, which under the authorities above cited was beyond its constitutional power under the Fourteenth Amendment and under the Federal Constitution relating to the impairment of the obligation of contract.

The complaint or declaration stating no cause of action, and there being no evidence to support the judgment, it is, under the above authorities, absolutely void, and any execution issued therein, accordingly, would be absolutely void. 15 R. C. L., Section 193, page 739, and authorities cited.

Accordingly, Sections 4255-4259, 4270, 4287-4288 of Crowford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of executions on judgments are unconstitutional under the Fourteenth Amendment when applied to the enforcement of a void judgment.

CONCLUSION

It is earnestly insisted by appellant, Life & Casualty Insurance Company of Tennessee, that the decree and judgment of the Supreme Court of Arkansas sustaining the validity of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, as applied to the facts of this case, is erroneous and that said Act and the judgment herein is repugnant to the respective clauses of the Federal Constitution as hereinbefore set out, and that the judgment herein rendered on the merits of the case also be reversed and dismissed.

We, therefore, respectfully ask that the judgment of the said Arkansas Supreme Court be reversed and judgment entered here for the appellant, Life & Casualty Insurance Company of Tennessee, so as to correct such errors.

This brief for appellant was prepared without the record being available. Upon November 6, 1933, a telegram was received from the Clerk of this Court notifying appellant that the case would be heard within a week, during which time the record must be printed and all briefs prepared. Many other authorities could have been cited, but the want of time limited appellant in the preparation of this brief. Accordingly, there are no references to the pages in the record.

All italics are ours.

Dated this 7th day of November, 1933.

Respectfully submitted,

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Life & Casualty Insurance Company of Tennessee.

Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES.

No. 509.—October Term, 1933.

Life & Casualty Insurance Company of Tennessee, Appellant,
vs.
Albert Barefield, Appellee.

On appeal from the Supreme Court of Arkansas.

[March 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

In a suit upon a policy of accident insurance, the respondent recovered a judgment in accordance with a stipulation declaring the extent of the liability if the insurer was liable at all.

Attorney's fees and twelve per cent damages were added to the recovery in accordance with the statute. Section 6155, Arkansas Digest, Crawford & Moses, 1921.

The case presents the same question as No. 89, *Life & Casualty Insurance Company of Tennessee* v. *McCray*, and is ruled by that decision.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.